

In approving this deal as a "sale" within the meaning of the agreement, a majority in the Illinois Supreme Court ignored the transaction's manifest purpose—continuation of control in the hands of the same trustees.<sup>15</sup> Since the provision for termination in any event within ten years is analagous to Section 30a's ten-year limit, the Supreme Court's failure to invalidate the arrangements of the *Plast* case sets up spurious sales as the pattern for circumventing the statutory prohibition. However, a greater awareness of the actual objectives of such transactions might result in rejection of the *Plast* case. It could, moreover, be distinguished from cases under Section 30a because its time limitation was contractual.

### AN AMERICAN LEGAL DILEMMA—PROOF OF DISCRIMINATION

The control of discrimination through legal sanctions is a two-fold process: (1) the enactment of anti-discrimination measures; (2) the enforcement of these measures. While in the past primary emphasis has been given the former, with the passage of anti-discrimination laws in a growing number of states, the enforcement factor is of an immediate and growing importance.<sup>1</sup> Essential to the enforcement process is proof of discrimination in individual cases. It may well be that in a large sense the success or failure of combating discrimination through legal devices will ultimately depend upon the evidentiary proof which can be achieved in individual cases.

While effective enforcement demands proof of discrimination in individual cases, that an act has been discriminatory is not in all cases susceptible of clear and certain demonstration. Thus if the requirements of proof are made too rigorous, effective enforcement will not be achieved. On the other hand, lax requirements of proof may result in erroneous findings of discrimination and in unjustified limitations of free choice. At both the enactment and the enforcement stages in the legal control of discrimination the ideal of equality, upon which anti-discrimination measures are based, is in conflict with the equally fundamental ideal of free choice. When an anti-discrimination law is enacted it has been decided that the societal demands of equality justify a certain limitation on free choice. But that limitation of free choice which results from an erroneous finding of discrimination is not justified by the legislation.<sup>2</sup> Because

<sup>15</sup> Contrast the dissenting opinion of Judge Gunn, *ibid.*, at 317, 162.

<sup>1</sup> For example FEP Acts: N.Y. Executive Law (McKinney, Supp. 1948) c. 23, §§ 125-36; Conn. Gen. Stat. (1949) §§ 7400-7; 1 Mass. Ann. Laws (Supp. 1948) c. 6, § 56; N.J. Rev. Stat. (Supp. 1937) tit. 18, c. 25, §§ 1-28; N.M. S. 45, 19th Assemb., Reg. Sess. (March 17, 1949); R.I. H. 539, Gen. Assemb. 1949, Reg. Sess. (April 1, 1949); Ore. S. 235, 45th Assemb., Reg. Sess. (March 21, 1949); Wash. S. 12, 21st Assemb., Reg. Sess. (March 19, 1949). Housing: Ill. Rev. Stat. (1947) c. 67½, § 82; Ind. Stat. Ann. (Burns, Supp. 1947) § 48-8503(b); Pa. Stat. Ann. (Purdon, 1949) tit. 35, § 1711(8). For an extensive bibliography see Graves, *Anti-Discrimination Legislation in the American States* (1948).

<sup>2</sup> The limitation of free choice and the dangers of an erroneous judgment are not, of course, unique with anti-discrimination measures. The outlawing of any action will serve to limit free

of the difficulty of proving with certainty that an act has been discriminatory, the question arises whether the desire for effective enforcement of anti-discrimination measures can be reconciled with a zealous regard for freedom of choice. The following discussion of the elements of proof, the means of proof, and the burden and precision of proof of discrimination are concerned with finding an answer to this question.

### I. ELEMENTS OF PROOF

In a sense all actions involving choice or selection are acts of discrimination.<sup>3</sup> Unjustifiable discrimination is a choice or selection based on an arbitrary, unreasonable, or otherwise undesirable standard.<sup>4</sup> The use of a particular standard as a basis of choice may be outlawed by the Constitution or by statute,<sup>5</sup> or a standard may be held to be arbitrary or unreasonable in a particular case by a court.<sup>6</sup> Our present concern is not with whether certain standards should be outlawed, but with the problem of proving that an already outlawed standard has been used in an individual case.

The problem of proving the use of any one standard remains essentially the same in all cases, whether, for example, the standard be race, union membership, or political affiliation. In the main, however, attention will be directed toward cases of discrimination based on race, religion, or national origin. The prevalence of these types of discrimination and the growing efforts to remedy them justify this limitation in scope.

In thus restricting the scope, however, it becomes necessary to distinguish discrimination from prejudice. Although there can be no doubt that discrimination and prejudice are sociologically interrelated,<sup>7</sup> as matters of legal proof they are conceptually separable. Individual prejudice is a mental attitude, the probable but not the necessary consequence of which is social action. Discrimination, on the other hand, is in itself a social act, motivated in some cases by

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choice, and the dangers resulting from an erroneous judgment are inherent in the enforcement thereof. The peculiar problem involved in anti-discrimination enforcement arises because of the difficulty of proof that an individual act has been discriminatory.

<sup>3</sup> While the courts may speak of both justifiable and unjustifiable discrimination, the connotation of the word in the present context and its function as a legally operative concept would seem to make it more useful to describe a selection as discriminatory only when the standard upon which it is based is unjustifiable.

<sup>4</sup> In the case of the "separate but equal" doctrine as applied to public facilities, while an arbitrary standard is being used in separating Negroes and whites, in theory the use of the standard causes no injury because the facilities are theoretically equal.

<sup>5</sup> For example, U.S. Const. Amend. 15, § 1, outlawing the denial of the right to vote because of race, color, or previous condition of servitude. See statutes cited note 1 *supra*.

<sup>6</sup> See *Truax v. Raich*, 239 U.S. 33 (1915), determining the constitutionality of a statutory classification on the basis of reasonableness.

<sup>7</sup> MacIver, *The More Perfect Union* 13 (1948). In the broadest sense it can be said that group prejudice is the cause of discrimination.

the actor's prejudices, but in other cases by different considerations.<sup>8</sup> This is to say that proof of prejudice alone is neither sufficient nor necessary in order to prove discrimination.<sup>9</sup> This in turn is a corollary to the more general proposition that discrimination may exist independently of malice or intention to discriminate.<sup>10</sup>

Nevertheless, the essential element of discrimination in its legal context is the mental process of the alleged discriminator. An employer who decides to hire a white rather than a Negro stenographer has made a choice adversely

<sup>8</sup> See *McWilliams, Race Discrimination and the Law*, 9 *Sci. & Soc.* 1 (1945), for a discussion of the distinction between prejudice and discrimination as it affects legal efforts to control the latter.

<sup>9</sup> For example, an employer may be violently anti-Semitic and nevertheless keep his business affairs free from his personal prejudices. In setting up his hiring policies he will conscientiously make certain that only objective criteria are used. Proof of the employer's anti-Semitism by a rejected Jewish job applicant is material to the issue of discrimination only if the causal relation between the prejudice and the refusal to hire the applicant can be demonstrated. On the other hand, an employer who fires all Negroes because of a threatened strike has discriminated although he may be free of any personal prejudice. The New York Anti-Discrimination Commission, hereinafter referred to as SCAD, has held that an employee's refusal to obey the Anti-Discrimination Law by threatening to strike or quit if Negroes are employed can be brought before the commission by the employer as a violation of the Anti-Discrimination Law. SCAD Annual Report (1948); cf. *Clover Fork Co., 4 N.L.R.B. 202* (1937), enforced *Clover Fork Co. v. NLRB*, 97 F. 2d 331 (1938) (employer's discharge of an employee at the request of other employees with anti-union views who threaten to leave their jobs if union employees are retained is a discharge for an anti-union motive.)

Under the Wagner Act § 8(3), 49 Stat. 449 (1935), 29 U.S.C.A. § 158(3) (1947), the NLRB in considering discrimination on the basis of union activity had said that if a discharge or refusal to reinstate was shown coupled with a background of anti-union activity and bias on the part of the employer, the presumption would be that the employer's actions were discriminatory, and the employer then had the burden of showing that his actions were not based on the employee's union activities. Upheld in *NLRB v. Remington Rand*, 94 F. 2d 862 (C.C.A. 2d, 1938); *NLRB v. Kentucky Fire Brick Co.*, 99 F. 2d 89 (C.C.A. 6th, 1938); *NLRB Third Annual Report 81-82* (1939). See Ward, Proof of "Discrimination" Under the National Labor Relations Act, 7 *Geo. Wash. L. Rev.* 797 (1939), for a discussion of the general evidence used to show anti-union bias. This included anti-union statements made by the employer. It would appear that Section 8(c) of the Labor-Management Relations Act of 1947, 61 Stat. 140 (1947), 29 U.S.C.A. § 158(c) (Supp. 1948), prohibits use of such statements. See Conference Report, H.R. Rep. 510, 80th Cong., 1st Sess., at 45 (1947). The situation differs from discrimination on the basis of race, religion, or nationality in that whereas employers and unions were often engaged in open conflict, thus giving rise to anti-union activity, the employer who discriminates on the basis of race, for example, usually has no relationship with the members of the discriminated group, or if there is a relationship, the group discriminated against is seldom sufficiently organized to create open conflict.

<sup>10</sup> The SCAD has held that while intention to discriminate is not an essential element of a violation of the Anti-Discrimination Law, the good faith of the respondent will be considered in determining what affirmative action should be taken. SCAD Annual Report 67-68 (1948). Some courts in considering the discriminatory selection of jurors have said that evidence that no discrimination had been intentionally practiced would support the finding of no discrimination. *State v. Middleton*, 207 S.C. 478, 36 S.E. 2d 742 (1946). See cases collected in 1 *A.L.R. 2d* 1291, 1300 (1948). Such a view, however, seems to be contradictory both to the nature of discrimination and the doctrine of the Supreme Court. *Smith v. Texas*, 311 U.S. 128, 132 (1940). "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

affecting the Negro. But the choice is in itself not discriminatory unless race is a consideration in the formulation of that choice. It is in identifying these mental processes in individual cases that legal proof of discrimination can be distinguished from its sociological counterpart. The sociologist, whose primary interest is group behavior, is not concerned with whether single actions within a total behavior pattern are themselves acts of discrimination. He looks primarily to the social effects of the general pattern to determine whether the pattern is discriminatory.<sup>11</sup> In dealing with the unequal treatment of Negroes and whites in a particular region, community, or industry, the sociologist has a collection of single instances of unequal treatment from which he may detect race as the single element always accompanying the unequal treatment. Thus by an inductive process he may conclude that race, the common element in one group as well as the distinguishing element between the groups, is the cause of the unequal treatment.<sup>12</sup> The lawyer, on the other hand, because he is, in many cases, forced to deal merely with a single instance of unequal treatment is deprived of other instances with which he can make a comparison. As a result he must look directly to the mental processes of the alleged discriminator in order to determine whether there has been discrimination. The question arises, and will subsequently be considered, whether the law in dealing with cases of group discrimination may make use of an inductive process similar to that used by the sociologist.<sup>13</sup>

It is clear that discrimination, in its legal sense, may be directed toward and injure either a group or single individual. Discrimination against a group will in most cases result from a general discriminatory practice, while discrimi-

<sup>11</sup> See, for example, Myrdal, *An American Dilemma* (1944), with particular notice directed toward Appendix 6, as an illustration of this point.

<sup>12</sup> Mill, *A System of Logic—Ratiocinative and Inductive* 280 (8th ed. 1904): "First Canon—Method of Agreement. 'If two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause (or effect) of the given phenomenon.' Second Canon—Method of Differences. 'If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every circumstance in common save one, that one occurring only in the former; the circumstance in which alone the two instances differ, is the effect, or the cause, or an indispensable part of the cause, of the phenomenon.'"

<sup>13</sup> Although the objectives of the sociologist and the lawyer may differ, this does not necessarily mean that the lawyer cannot make use of the sociological techniques for discovering the facts which tend to establish discrimination. Thus, the case study, historical method, the schedule and questionnaire, and all of these used in conjunction with a statistical analysis may become useful legal tools in many cases. See Lundberg, *Social Research* (1942) for a discussion of these techniques. See *Content Analysis—A New Evidentiary Technique*, 15 *Univ. Chi. L. Rev.* 910 (1948), for a discussion of the legal use of a psychological and sociological method in proving prejudice. One difficulty which often may arise for the lawyer, particularly in the use of the questionnaire, is the problem of gaining the inquirer's confidence. Whereas this is a prerequisite for a sociologist's study, a lawyer who is working on a case for his client will seldom be able to obtain the confidences of the opposing party. This may be one of the reasons why the state FEP Commissions have used the "conference, conciliation, and persuasion" method of enforcing FEP Acts, with primary reliance on voluntary compliance, rather than on court enforcement.

nation against an individual, though perhaps accompanied by a general practice, will in most cases be a single discriminatory act. It is also apparent that discrimination against either a group or an individual may result from state or private actions. State discrimination may result from the use of an outlawed standard as a basis of a constitutional, statutory, or administrative classification,<sup>14</sup> or from its use by state officials or administrative agencies in the conduct of their affairs.<sup>15</sup> The means by which the party alleging discrimination can best meet the burden of proof depends upon whether group or individual discrimination is charged, whether the charge is brought against the state or a private person, and whether damages, an equitable remedy, or the enforcement of a criminal sanction is sought.

## II. MEANS OF PROOF

Both state and private discrimination may be express,<sup>16</sup> apparent,<sup>17</sup> or admitted. In many cases, however, the state or private person is silent as to the standard used, or if a standard is expressed, though "fair on its face," it may be unlawfully applied. The difficult problems of proof arise in the latter situations when the illegal use of a standard must be proved to a large extent by circumstantial or indirect evidence. It is to these situations primarily that attention will be directed in this note.

The recent Boswell Amendment to the Alabama Constitution offers an excellent illustration of a state directive fair on its face but discriminatory against a group in its application. The Amendment provided that only those persons who could "understand and explain" any article in the federal Constitution could be registered as an elector.<sup>18</sup> Although the words could not be interpreted as being per se discriminatory on the basis of race, the district court labeled this a grant of arbitrary power which denied equal protection because of the ambiguity of the requirements and the absence of any objective or standardized test.<sup>19</sup> Evidence that the advocates of the amendment intended that it should be applied in a discriminatory manner and that in practice such was the case

<sup>14</sup> For example, the "grandfather clauses" controlling election registration. *Guinn and Beal v. United States*, 238 U.S. 347 (1915).

<sup>15</sup> See cases cited note 22 *infra*.

<sup>16</sup> For example, a statute providing that Negro teachers should be paid under a different wage scale than white teachers is expressly discriminatory. See *Mills v. Lowndes*, 26 F. Supp. 792 (Md., 1939).

<sup>17</sup> See *Lane v. Wilson*, 307 U.S. 268 (1938) (election registration based on prior voting record); *Guinn and Beal v. United States*, 238 U.S. 347 (1915).

<sup>18</sup> Ala. Const. Art. 8, § 181, as amended and adopted Nov. 7, 1946.

<sup>19</sup> *Davis v. Schnell*, 81 F. Supp. 872 (Ala., 1949). Although the concepts are not clearly distinguishable, it would seem that an arbitrary power is more a deprivation of due process than a denial of equal protection, while the discriminatory application of an arbitrary power would be the latter.

led the court to the conclusion that the amendment was also unconstitutional as a violation of the Fifteenth Amendment of the federal Constitution.<sup>20</sup>

In other cases the constitutional, statutory, or administrative provision is not itself attacked, but an allegedly discriminatory application of a "fair" standard is sought to be enjoined. For example, it has been decided that the fixing of public school teachers' salaries on the basis of race is state action in violation of the Fourteenth Amendment.<sup>21</sup> In many cases the criteria by which the teachers are purportedly evaluated are in themselves nondiscriminatory, and the charge that the criteria have been unlawfully applied will be denied.<sup>22</sup> Proof of discrimination in such a case involves showing that the Negro and white teachers, while possessing equal qualifications and performing comparable duties, nevertheless receive different salaries,<sup>23</sup> the inference being that the Negro teachers are paid lower salaries because of the only common characteristic distinguishing them from the whites, their race. The difficult problem of proof is incurred in attempting to prove that the Negroes are as well-qualified as the whites. This is true because, unlike the election registration cases,<sup>24</sup> the courts have been unwilling to limit the range of a school board's discretion in the employment of teachers to the use of objective or standardized criteria.<sup>25</sup>

<sup>20</sup> *Ibid.* The evidence included evidence that the "understand and explain" test was given to Negroes and not to whites; that during the incumbency of the defendant County Board of Registrars, whereas 2,800 whites were registered, only 104 Negroes qualified, although Negroes made up 36 per cent of the county's population. The great discrepancy between the Negro-white population ratio and the Negro-white qualification ratio is a result not likely to occur by chance. Because the groups are relatively large it may be tacitly assumed that there are no common characteristics other than race in each group which could account for so large a discrepancy. Thus, here, the court, like the sociologist, can reasonably infer that race is the cause of the results.

<sup>21</sup> *Morris v. Williams*, 149 F. 2d 703 (C.C.A. 8th, 1945); *Alston v. School Board*, 112 F. 2d 992 (C.C.A. 4th, 1940), cert. den. 311 U.S. 693 (1940); *Mills v. Board of Education*, 30 F. Supp. 245 (Md., 1939); cf. *Kerr v. Enoch Pratt Free Library of Baltimore*, 149 F. 2d 212 (C.C.A. 4th, 1945), cert. den. 326 U.S. 721 (1945) (discrimination by a privately endowed library which was for a public purpose and used state funds held to be state action).

<sup>22</sup> *Freeman v. County School Board*, 82 F. Supp. 167 (Va., 1948); *Davis v. Cook*, 80 F. Supp. 443 (Ga., 1948). In other cases the school board has attempted to rationalize its actions by such arguments as: Negro teachers were employed only to teach Negro children; therefore, salary was based not on the race of the teachers, but on the "color" of the pupils. See *Thomas v. Hibbitts*, 46 F. Supp. 368 (Tenn., 1942). White teachers must pay more for economic necessities and in order to maintain a social standing commensurate with their position. See *Turner v. Keefe*, 50 F. Supp. 647 (Fla., 1943). To recognize such attempts at rationalization would be to destroy in effect the endeavors to outlaw the standard. Another argument has been that Negro teachers are not as well-trained because not admitted to accredited state teachers' colleges. *Reynolds v. Board of Public Instruction*, 148 F. 2d 754 (C.C.A. 5th, 1945), cert. den. 326 U.S. 746 (1945). A court's recognition of this argument would seem to obliterate the last vestige of the "separate but equal" fiction.

<sup>23</sup> Cases cited notes 21, 22 *supra*.

<sup>24</sup> *Davis v. Schnell*, 81 F. Supp. 872 (Ala., 1949).

<sup>25</sup> See *Davis v. Cook*, 80 F. Supp. 443, 447 (Ga., 1948): "The subjective criteria . . . if applied in a fair and non-discriminatory manner are not only permissible but highly important and commendable."

Thus, not only is it necessary to prove that the Negro teachers hold the same educational degrees as the whites and have equal teaching experience, but also that they are equal, for example, in poise and in the ability to stimulate students.

It would be difficult to show affirmatively that each Negro teacher in a school district has the same objective and subjective qualifications as the white teachers. The probability is slight, however, that *all* the Negro teachers in the district would be deficient in those qualifications, other than race, which are possessed by *all* the white teachers. Therefore, if the Negro teachers employed by a defendant school board satisfy the same objective requirements, yet receive lower salaries than the white teachers performing comparable duties, a reasonable inference would be that the characteristic obviously common to all the Negro teachers is the cause of the wage discrepancies.<sup>26</sup> This is an example of the sociologist's method of inducing from an aggregate of similar effects the use of a racial standard as the more probable cause of those effects.<sup>27</sup>

Two difficulties may arise when attempting this indirect, inductive kind of proof. First, in some cases the group involved may be so small that it could not be reasonably assumed to be a representative sample of the population. For example, in a group of ten teachers, it might be argued that it was not unreasonable that by chance each member of the group lacked a subjective quality in the same way that it is possible that a coin tossed ten times will each time come up heads. However, by taking as the group not only those teachers presently employed, but also those employed in past years, a larger, and therefore more representative and homogeneous group can be considered.<sup>28</sup> A second, and

<sup>26</sup> While a possible inference would be that each of the Negro teachers lacked a different subjective qualification possessed by the white teachers, such an inference would be no more reasonable than the inference that all the Negro teachers lacked the same characteristic.

<sup>27</sup> Note 12 *supra*.

<sup>28</sup> The question arises whether the evidence of teachers' past wage scales is inadmissible as evidence of past misconduct or of habit. Evidence of past misconduct, while inadmissible to show "bad character," can be introduced for the purpose of showing a design, motive, or intent. Wigmore, *Evidence* §§ 193, 215 et seq. (3d ed. 1940). Moreover, the teachers' past wage scales are not like evidence of past misconduct introduced for the purpose of showing the likelihood of the present act being performed by the defendant. The issue is not whether the school board paid the Negro teacher lower wages. This is presumably either admitted or proven. The ultimate issue is whether the Negroes were paid lower wages because of their race. The evidence of past wages is evidence of external results identical in appearance with the present results and is introduced for the purpose of presenting the court with the means of determining whether race is the common cause for all the results, both past and present. Because the past and present wages must be considered together in order to determine whether they have any probative value in establishing whether race was a factor in the fixing of wages, the objections raised against evidence of past misconduct seem to have little applicability in the present context. See Wigmore, *Evidence* § 194 (3d ed. 1940). Nor are the past wage scales introduced as "habit evidence" showing the likelihood of performance of the present act. The probative value of the evidence lies not in the fact that paying Negro teachers lower wages was a habit, but in that the lower wage was accompanied in a multiplicity of instances by the race characteristic.

The past wages are usually introduced by taking a statistical sampling from the master payrolls of the board of education. See, for example, *Davis v. Cook*, 80 F. Supp. 443 (Ga.,

perhaps more serious, difficulty may arise when the members of the group allegedly discriminated against are not uniformly paid lower salaries than the whites. Thus, evidence that one or more Negroes in the group are paid salaries equal to or greater than those paid the whites performing comparable duties may be introduced by the defendant to show that race is not a characteristic common to all those receiving lower salaries and that therefore no discrimination existed. In some cases the instances of higher salaries to Negroes will be so rare as to clearly reveal that they are merely "token" instances of nondiscrimination. In other cases it may be possible to show that the Negroes receiving the higher salaries are not only equal to but excel the whites, thereby identifying them as special exceptions to a general discriminatory practice. Failing in this, other kinds of evidence might be sought, such as the showing that white teachers started at higher wage rates than Negroes,<sup>29</sup> or that when blanket increases in salary were made, the whites received greater increases than the Negroes.<sup>30</sup>

It is of course true that not all sophisticated methods of discrimination both against the group and the individual can be proved. It is also true that the outlawing of the use of a particular standard may result in the utilization of subtle devices to conceal the continued use of the outlawed standard. It remains to be determined whether the use of such devices will be so great as to defeat the anti-discrimination measures at the evidentiary stage of anti-discrimination enforcement.

In considering proof of discrimination against a group, mention should be

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1948). This undoubtedly is done for the reason that to receive testimony by all the teachers would be highly impracticable. The payrolls themselves would seem to be competent evidence under the well-defined exception to the hearsay rule for the "business entry." Wigmore, Evidence § 1517 et seq. (3d ed. 1940). The sampling technique in obtaining evidence involves the grouping by objective criteria of the wages paid to the teachers. Thus, tables are made according to race, duty performed, years of experience, age, and basic salary. While there might be some objection to the theory underlying the sampling technique as being unscientific, it has been held that "... if the method used materially and erroneously affected the conclusions derived from the statistics . . . discrepancies could easily have been pointed out by tables made [by the defendants]. . . ." *Davis v. Cook*, 80 F. Supp. 443, 448 (Ga., 1948). While the groups are, in a sense, matters of opinion, nevertheless, since the computations are made by so-called "experts," the evidence would appear to be admissible under the "expert testimony" exception. Since the groupings are made according to objective criteria, the evidence does not raise the objections made against the subjective classifications which may occur in content analysis. See Content Analysis—A New Evidentiary Technique, 15 Univ. Chi. L. Rev. 910 (1948).

In some cases a school board may admit discrimination in the past but allege that the policy has been changed. See *Freeman v. County School Board*, 82 F. Supp. 167 (Va., 1948). In such a case, of course, if the school board can prove a change of policy, evidence of the past wage rates could not be used in making the desired induction. In the *Freeman* case, however, the board failed to prove a change of policy and the court held: "The lower salaries consistently paid the colored teachers over a period of years, coupled with the admitted discrimination which existed prior to 1941, lead me to the conclusion that the discrimination existing is due solely to race. . . ." *Ibid.*, at 170.

<sup>29</sup> *Thompson v. Gibbes*, 60 F. Supp. 872 (S.C., 1945).

<sup>30</sup> *Morris v. Williams*, 149 F. 2d 703 (C.C.A. 8th, 1945).



made of the relationship between a class action and the means of proof.<sup>31</sup> An important advantage of the class action in this respect is that it makes possible the use of the indirect, inductive method used by the sociologist. When an individual Negro teacher alleges that race has been a consideration in the fixing of his wages, proof that other teachers have been rated on the basis of race is relevant to his case only by means of the inference that since other teachers have been so rated, this teacher has been so rated. But when the issue is whether the group has been discriminated against, the question whether a racial standard has been used in the evaluation of many teachers is directly relevant.<sup>32</sup>

A second advantage of the class action lies in the fact that when the ultimate issue is discrimination against the group, the decisive question often becomes not whether each member of the group is equal in all material respects to members of other groups, but whether there is a group characteristic which makes the members of the group unequal to members of other groups. In the cases of racial, religious, and national groups, the courts must assume that there is nothing in the race, religion, or nationality which would bring about inequality in the group.<sup>33</sup> This assumption, coupled with the showing of a group of sufficient size as to form a representative sample, will lead to the conclusion that the group qua group is equal to other groups. However, such conclusion does not mean that each individual member of the group is equal to members of another group; yet this may be precisely the issue which an individual bringing a charge of discrimination may have to prove in those cases where there is no direct evidence of discrimination.

The selection of jurors on the basis of race is an illustration of state discrimination having features both of discrimination against a group and against an individual. It is well-established that a Negro defendant tried for a crime by a jury which has been selected in a discriminatory manner is deprived of equal

<sup>31</sup> Not only is the financial burden an obstacle to single parties bringing the suit, but when the charge is discrimination against the group and general enjoining is sought, the outcome of the suit may directly affect all the individuals in the group. The federal courts have upheld the class action when brought by qualified Negro school teachers in a school district on the ground that they form a special professional class having rights of common and general interest which can be represented by the plaintiff bringing the suit. *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638 (Fla., 1941); Rule 23, 28 U.S.C.A. foll. § 723(c) (1948). The courts, in hearing class actions by Negro electors alleging discrimination by county registration officials, have been in conflict. The action was allowed but not considered in *Davis v. Schnell*, 81 F. Supp. 872 (Ala., 1949), perhaps because the constitutionality of the Boswell Amendment itself was being considered. *Contra: Mitchell v. Wright*, 62 F. Supp. 580 (Ala., 1945), rev'd on other grounds, 154 F. 2d 294 (C.C.A. 5th, 1946), cert. den. 329 U.S. 733 (1946), denying class action on the ground that the Negro electors did not comprise a specific class like the professional teacher group. In a rehearing of the substantive issues no class action was brought. 69 F. Supp. 698 (Ala., 1947).

<sup>32</sup> Note 28 supra.

<sup>33</sup> Such an assumption in many cases ignores the long-run social effects of group discrimination. For example, while there may be nothing inherent in the group which would bring about inequality in the group, discrimination against the group may deprive the members thereof of equal training and educational opportunities. See Myrdal, *An American Dilemma* c. 17, § 5 (1944).

protection of the law and is therefore entitled to a retrial.<sup>34</sup> The basis of this right to a retrial is, in the absence of a special statute, the notion of a right to a trial by an unbiased jury, the presumption being that a jury deliberately made up of white persons will be prejudiced against a Negro.<sup>35</sup> The ultimate issue is whether the particular jury trying the defendant has been selected on a racial basis. The discrimination is against a group in the sense that the selection of jurors on a racial basis discriminates against all Negroes who might otherwise have been selected but for their race.<sup>36</sup> But the courts have considered the injury caused by such discrimination only as it affects the party being tried by the particular jury in question.<sup>37</sup> The charge of discrimination in this type of case, then, is a charge against the state for group discrimination which has caused injury to a particular individual. But whereas the previously discussed cases of group discrimination involved general discriminatory practices, this situation theoretically involves a single instance of discrimination, the selection of the particular jury trying the complainant.

In the absence of direct evidence or an admission, proof that the jury in question has been unlawfully selected is particularly difficult, if not impossible, because the absence of discrimination in no way guarantees that every jury panel will have either a proportionate representation of Negro and white members, or in fact, that any Negroes will appear on a particular jury.<sup>38</sup> The Supreme Court has, however, made it possible to avoid this difficulty. It has held that proof of systematic discrimination in the past, coupled with the presence of Negroes in the district qualified to serve, is sufficient to justify the granting of a retrial in the absence of proof by the state that no discrimination in fact existed.<sup>39</sup> This is clearly use of habit evidence to prove present conduct.

<sup>34</sup> *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); see 1 A.L.R. 2d 1291 (1948) for a collection of cases.

<sup>35</sup> *Fay v. New York*, 332 U.S. 261 (1947), rehearing den. 332 U.S. 784 (1947).

<sup>36</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). "The fact that colored people are singled out . . . is practically a brand upon them . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

<sup>37</sup> Cases cited note 34 supra. A white man, although tried by an intentionally all white jury, is not, in most cases, injured by racial prejudice and cannot invoke the Fourteenth Amendment without showing special injury. *Griffin v. State*, 183 Ga. 775, 190 S.E. 2 (1937); cf. *State v. James*, 96 N.J.L. 132, 114 Atl. 553 (1921) (defendant, a male, could not claim unequal protection when tried by an all-male jury).

Again the inter-relationship between "due process" and "equal protection" becomes evident. A biased jury, it may be said, results in the deprivation of due process. Discrimination in the selection of jurors is an unconstitutional deprivation of equal protection only when the discrimination may result in a biased jury. Perhaps an explanation for the presence of this limitation lies in the fact that the courts have considered the discrimination primarily as it affects the party on trial and not as against the members of the class excluded.

<sup>38</sup> *Fay v. New York*, 332 U.S. 261 (1947), rehearing den. 332 U.S. 784 (1947); *Akins v. Texas*, 325 U.S. 398 (1945); *Thomas v. Texas*, 212 U.S. 278 (1909).

<sup>39</sup> *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Norris v. Alabama*, 294 U.S. 587 (1935).

It appears, however, to be justifiable both on theoretical and practical grounds. There is a strong probability that jury commissioners who have systematically discriminated in the past are not likely to change their course of conduct without such change having visible manifestations. If a change has taken place the state can prove it. Moreover, in a practical sense, the use of habit evidence in this context might be justified on the ground that little or no other evidence will be available to the defendant allegedly deprived of equal protection.

The Supreme Court has said that if it can be shown that no Negroes have served as jurors for a period of years and that there were Negroes in the district qualified to serve, this is sufficient to create a "prima facie" case of discrimination.<sup>40</sup> The implicit reasoning underlying the recognition of the "prima facie" case seems to rest on common-sense notions of probability. It is assumed that, by the laws of chance, in an area where both Negroes and whites are qualified to serve, a nondiscriminatory selection will result, over a period of time, in both Negroes and whites actually serving. Thus, if in fact no Negroes have served, it is reasonable to infer that race rather than chance is the probable cause of the result.<sup>41</sup> The length of time in which no Negroes have served which would lead to such an inference will vary inversely with the proportion of Negroes in the area who are qualified to serve.<sup>42</sup>

A more difficult problem of proof may arise when members of a particular race or class are not totally excluded from jury service, but where a disproportionate representation is shown to have been present over a period of years. The question arises whether either common sense notions or a statistical analysis can account for a consistent disproportion as being brought about because of racial discrimination. The problem involves the prediction of an expected representation in the absence of discrimination and the determination of whether the deviation between the actual representation and the expected one is "significant." The important figure in making the prediction is the number of Negroes in the area qualified to serve. However, in many states the qualification requirements may be such that the number of qualified Negro voters in a

<sup>40</sup> Ibid. It has also been said that if it can be shown that there were literate Negroes in the area, the presumption would be that at least some were qualified to serve. *Hill v. Texas*, 316 U.S. 400 (1942).

<sup>41</sup> *Smith v. Texas*, 300 U.S. 128 (1940). While this is not a necessary inference, it is no doubt felt that the greater probability justifies the shifting of the burden to the state to demonstrate that another explanation can reasonably account for the exclusion.

<sup>42</sup> For example, in a district comprised of 75 per cent Negroes, half of whom are qualified to serve on juries, the probability that no Negro would appear on a single twelve-man jury in the absence of discrimination is approximately .4<sup>42</sup>. Nevertheless, no court has said that the absence of Negroes from a particular jury would alone justify the granting of a new trial, nor is a defendant in any case entitled to a proportionate representation or any representation of his group on a jury or jury panel, if they have been selected in a nondiscriminatory manner. Cases cited note 38 *supra*. Where it was shown that Negroes constituted one-half of the population of 12,000-15,000 from which the general jury venire was drawn, and that no Negro for a period of ten years had served on a grand or petit jury, this, in view of the fact that the state failed to call the jury commissioners as witnesses, justified a finding of discrimination. *Pierre v. Louisiana*, 306 U.S. 354 (1939).

given district may be so few as to make valid prediction impossible.<sup>43</sup> Another difficulty in making a prediction as to an expected representation may arise when the proportion of Negroes in the area either increases or decreases materially during the period which the prediction covers.<sup>44</sup> Thus it can be said that while the extended absence of Negroes from jury service tends to establish discrimination, the disproportionate representation of Negroes on juries without other evidence has little probative value.

Proof of discrimination against an individual gives rise to the greatest difficulties, because in many cases the only method of proving the use of an outlawed standard is the inference which may be drawn from showing that an individual allegedly discriminated against is equal to other persons in respect to those standards on which the treatment was based.<sup>45</sup> For example, if it can be shown that a rejected Jewish job applicant is as equally qualified for the job as gentile applicants who have been accepted, or as the present employees, a reasonable inference would appear to be that the Jewish applicant was rejected because of his religion. The difficulty arises because an employer may use whatever objective or subjective standards he chooses other than those outlawed by the state. An employer may refuse to hire men with red hair, or he may fire an employee because he has a "displeasing manner" without violating a Fair Employment Practices Act which outlaws employment only on the basis of race, creed, color, or national origin.<sup>46</sup> It can be seen that proof of discrimination then will often involve distinguishing the actual cause of the employer's actions from his alleged reasons or pretext.

Proof of discrimination in employment will be taken as the illustrative case of individual discrimination not only because it offers excellent illustrations of the general problems involved, but also because economic discrimination is of primary concern to the minority groups,<sup>47</sup> and finally because the problem of proof is of immediate and widespread importance to lawyers with the passage of FEPC Acts in an increasing number of states.<sup>48</sup> The New York Anti-Discrimination Law,<sup>49</sup> since it was both the forerunner of and the model for subsequent acts, will be used as the basis for discussion.<sup>50</sup>

<sup>43</sup> Qualification requirements may include literacy, lack of a criminal record, "intelligence," "good moral character," election registration. Exclusion of Negroes from Jury—Sufficiency of Evidence to Establish Discrimination, 30 J. Crim. L. 264 (1939). Thus, as an example, in a southern state where the election registration has been conducted in a discriminatory manner, very few Negroes may be available for jury service.

<sup>44</sup> *Moore v. New York*, 333 U.S. 565 (1948).

<sup>45</sup> In cases where an affirmative remedy is sought, rather than a cease and desist order or an enjoining of discriminatory practices, proof of the individual complainant's equality may be a necessary element in order to show that but for the use of the outlawed standard the complainant would have been treated differently.

<sup>46</sup> Statutes cited note 1 *supra*.

<sup>47</sup> See Myrdal, *An American Dilemma* c.3, § 4 (1944).

<sup>48</sup> Note 1 *supra*.

<sup>49</sup> N.Y. Executive Law (McKinney, Supp. 1948) c. 23, §§ 125-36.

<sup>50</sup> See Graves, *Anti-Discrimination Legislation in the American States* (1948).

At the outset it should be noted that the problem of proof in question is not identical with proof in the law courts, for the findings of discrimination are made by an administrative commission not bound by the strict legal rules of evidence.<sup>51</sup> However, the commission's findings are subject to judicial review and must be supported by "sufficient evidence on the record considered as a whole."<sup>52</sup> Thus, while questions of competency need not be considered, the fundamental problems of relevancy and of probative value are the same. It should also be pointed out that both in New York and other states in which anti-discrimination statutes have been passed, primary reliance is placed upon the "conference, conciliation, and persuasion" method of enforcement rather than upon court actions.<sup>53</sup>

But while voluntary compliance appears to be the primary means of enforcing the statute, the ultimate test of the statute's efficacy will depend upon the courts' willingness to enforce the commission's orders. This in turn will presumably depend upon the evidence of discrimination offered in the formal hearing.

<sup>51</sup> N.Y. Executive Law (McKinney, Supp. 1948) c. 23, § 132.

<sup>52</sup> *Ibid.*, at § 133. While neither the Commission nor the courts have yet had occasion to interpret this phrase the view has been expressed by the General Counsel of the New York Commission that it is believed that it will be given effect similar to that given the "substantial evidence" rule. Correspondence from the General Counsel of the New York Commission, dated May 4, 1949. Under the Wagner Act the courts have said that substantial evidence is that "relevant evidence acceptable to a reasonable mind as adequate to support the conclusion, and it must be enough to justify, if the trial were to a jury, refusal to direct a verdict." *Montgomery Ward & Co. v. NLRB*, 107 F. 2d 555 (C.C.A. 7th, 1939), citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Columbian Enamel & Stamping Co.*, 306 U.S. 292 (1938). Fair Employment Practices Acts in the other states vary to some extent both as to the applicability of the legal rules of evidence and the scope of judicial review. Statutes cited note 1 *supra*.

<sup>53</sup> SCAD Annual Report (1946); Correspondence from the Chairman of the Massachusetts FEP Commission, dated April 29, 1949. As a sanction for the Commission's recommendations made at these informal meetings the proceedings are kept secret with the warning that in the absence of compliance public hearings will be held. See the New State Commission Against Discrimination: A New Technique for an Old Problem, 56 Yale L.J. 837 (1947). Upon receiving a complaint of discrimination, an investigation is made by the Commission of the employer's employment processes, his sources of recruitment, job specifications, wages, hiring, and promotion and dismissal procedures. At the same time the individual qualifications of the particular complainant are determined. If "probable cause" is found either to credit the complainant's allegations or to indicate a general discriminatory employment pattern an informal conference with the respondent is held. It is at this stage that voluntary compliance with the Commission's recommendations are sought. Through 1948, resort to proceedings beyond this stage have been unnecessary. SCAD Annual Report 3, 5, 37 (1948). As to what constitutes "probable cause" the General Counsel has indicated that the finding of "probable cause" by the Commission's investigator is not the same thing as a finding of fact that respondent was discriminatory. Correspondence from the General Counsel of the New York Commission, dated May 4, 1949. If voluntary compliance is not obtained, a formal hearing may be held. N.Y. Executive Law (McKinney, Supp. 1948) c. 23 § 132. It is upon the Commission's findings and orders made at the formal hearing that an appeal to the courts may be taken either by the complainant, employer, or other person aggrieved by such order, or by the Commission itself. *Ibid.*, § 133. It should be emphasized that since no formal hearings or court actions have been held, either in New York or the other states, the meanings of "probable cause" and "sufficient evidence" are speculative questions whose ultimate interpretation must rest with the courts.

While there can be no doubt that some flagrant cases of discrimination can be easily proved, the question arises whether some of the more subtle instances of discrimination can be controlled by legal sanctions.

Generally the evidence tending to establish that an employer has discriminated against an individual can be divided into three categories (1) evidence of general discriminatory employment patterns and practices in the plant; (2) evidence that the complainant is qualified for the job in question; (3) evidence showing that the reasons given by the employer for his actions are unsubstantiated or are mere pretext.

The evidence described in the first category is again evidence of discrimination against a group used to establish the probability of discrimination against the individual complainant. It is clear that this evidence alone without further evidence of the kind described in the second category would not be enough to justify an order requiring the employer to take affirmative action toward the complainant. The Commission has said, however, that "[d]iscrimination in employment should not be treated as an isolated act. As a rule it is a continuing action crystallized into a policy accepted and approved by management and labor and the community."<sup>54</sup>

The evidence of discrimination against the group is similar to the types of evidence already discussed. But the complexities involved in the employment situation are sufficiently different to merit special discussion. A hypothetical case will serve as a basis from which several of the complexities may be illustrated.

X, a Negro, in answer to an advertisement for a machinist, applies for a job at a plant engaged in manufacturing safety-pins. The plant has 300 employees, none of whom are Negroes, and is situated in a community whose population is 10 per cent Negro. Negroes have never been employed at the plant. X is refused the job without reason, but the Commission's investigator is told that the reason for refusal was that X "looked dishonest."

The first question is whether the fact that no Negroes have been employed is evidence of discrimination; that is, whether the probability that no Negroes would be employed in the absence of discrimination is sufficiently small as to lead to the inference that racial discrimination caused the absence of Negro employees. The problem here, as in the jury-selection cases,<sup>55</sup> is to make a pre-

<sup>54</sup> SCAD Annual Report 2 (1948). "The terms of conciliation in complaints where probable cause has been found have been directed not only to secure adjustment of the individual complaint but to change the hiring policy on every occupational level. Even where probable cause was not found for crediting the allegations of the complaint as to the individual complainant, the Commission, where appropriate, has outlined a course of action for the respondent to follow to assure compliance with the provisions of the Law." *Ibid.*, at 5. In Connecticut, on the other hand, it appears that primary attention has been directed toward the adjustment of specific charges rather than "blanket charges" except where there is a written regulation or policy which is in itself a violation of the FEPA. Correspondence from the Connecticut Supervisor, Fair Employment Practices Division, dated May 2, 1949.

<sup>55</sup> Cases cited note 39 *supra*.

diction as to the number of Negroes expected to be employed in the absence of discrimination and to determine the deviation of the actual number of Negroes employed (in this case, zero) from the expected number. In most cases, however, the prediction of an expected number rests on so many factors other than the proportion of Negroes in the community that its validity would be extremely doubtful. First, the number of Negroes in the community qualified for the work must be determined.<sup>56</sup> Second, it is necessary to determine the number of Negroes who have applied for jobs at the plant.<sup>57</sup> It is also necessary to determine not only how many workers are presently employed, but also the personnel turn-over in the plant and the number of hirings in the period in question. An even more difficult problem arises when the plant in question has employed some Negroes in the past but it is suspected that the plant operates on an undisclosed "quota system." In such a case not only would the general qualifications of the Negroes have to be considered, but also job differentiations would have to be made. Moreover, assuming that a valid prediction could be made, in the case of a small plant with little turn-over in personnel, the deviation of the actual number from an expected number of Negroes employed may not be "significant."<sup>58</sup> This is not to say, however, that the fact that no Negroes had been employed in a plant over an extended period, or that the number of Negroes employed was relatively small, has no probative value when shown with other evidence. In the hypothetical case, if it could be shown that X and other *qualified* Negroes had applied for jobs and had been refused although the plant had been hiring, a finding of discrimination might be substantiated by the fact that no Negroes or few Negroes had been employed. Similarly, in the case of discharges alleged to be discriminatory, if the proportion of Negroes laid off greatly exceeded the proportion of whites, this might lead to the inference that the discharges were made on the basis of race if it could be shown that the Negroes discharged were as qualified as the whites who were retained.<sup>59</sup> Again,

<sup>56</sup> Consider, for example, if the complainant were a chemist seeking a job at a chemical laboratory.

<sup>57</sup> Consider, for example, the so-called "white-men jobs," those for which, as a result of custom, Negroes seldom applied. In such a case the fact that no Negroes were employed would have little significance in establishing that an employer had discriminated. For example, prior to World War II, these jobs included electrical workers, machinists, and sheet metal workers. See Weaver, *Negro Labor—A National Problem* 18 et seq. (1946).

<sup>58</sup> See Fisher, *Statistical Methods for Research Workers* c. 3 (1938).

<sup>59</sup> Compare *Matter of F. W. Woolworth Co.*, 25 N.L.R.B. 1362, 1373 (1940) (discharge of union employees): "It would be expected that in a selection of employees to be laid off without regard to union affiliation the proportion of union members among those laid off would approximate the proportion existing in the group from which the selection was made. . . . Of course any combination is a possible result on the basis of pure chance. Variation from the expected does not necessarily establish that the operation of chance has been frustrated by intelligent selection. When, however, the variation is marked or is manifested consistently in repeated samplings, the hypothesis that union membership was irrelevant to the selection gives way to the inference that the selection was made upon a discriminatory basis."

An essential distinction between union, on the one hand, and racial, religious, and national-origin discrimination, on the other, is that whereas the former is confined generally to the

in a plant where Negroes are hired to fill only certain jobs, while such a showing in itself might not be significant, this coupled with the showing that qualified Negroes had been refused jobs in other capacities while whites had been hired might reasonably lead to the inference that there had been discrimination.

The second question is, how can "equal qualification" be shown? In the cases where a plant gives examinations as a prerequisite to employment, the results of these examinations would seem to offer an accurate guide.<sup>60</sup> The training and experience of the complainants and other applicants are also helpful indications. A second step would be to compare the objective qualifications of the individual complainant with the job specifications of the employer and with the qualifications of other applicants and employees.<sup>61</sup>

The question of subjective qualifications is closely related to the evidence described in the third category, the reasons given by the employer for his actions. As the term implies, subjective qualifications are primarily matters of individual opinion. But assume that an employer alleges that the complainant lacked a subjective qualification. If it can be shown either that the complainant could not reasonably be thought of as lacking in such qualification, or that the qualification was not reasonably related to the employment in question, then it would seem reasonable to use this showing as evidence that the employer had in fact discriminated. The NLRB, in hearing cases of alleged discriminatory discharges on the basis of union activity, has used as evidence of discrimination the fact that the employer gave a reason for discharge to the employee different from that presented to the Board, or the fact that the employer failed to assign a reason.<sup>62</sup> Thus, in the hypothetical case, while if X were in fact dishonest this could be understood as valid grounds for refusal, the burden should be placed on the respondent of showing the reasonable basis for his belief of X's dishonesty. His failure to do so could be taken as evidence

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employment relationship, the latter pervades the entire culture so that as a result of discrimination, the Negro, for example, may not only be refused a job on the basis of race, but also may be deprived of equal opportunities for training. Thus the assumption of equal qualification of Negro workers and white workers cannot as readily be made as in the case of union workers and nonunion workers. See Myrdal, *An American Dilemma* c. 3, § 7, and App. 3 (1944). In the case of discharges there is also the question of seniority, particularly in plants in which Negroes have only recently been hired.

<sup>60</sup> In some cases employers may destroy the examinations of rejected applicants, or of all applicants, in order to avoid their being used as evidence. The SCAD, having found "probable cause," may insist that an employer keep a record of all applications for employment during the following six-months' period, identifying the white and Negro applicants, the race of the applicants hired, and the reasons for the rejections. SCAD Annual Report 29 (1948).

<sup>61</sup> Such a procedure is practiced in New Jersey and Connecticut. Correspondence from Chief Assistant, New Jersey Division Against Discrimination, dated April 28, 1949; Supervisor, Conn. FEP Division, dated May 2, 1949.

<sup>62</sup> *Matter of National Casket Co.*, 12 N.L.R.B. 165 (1939), *aff'd* NLRB v. *National Casket Co.*, 107 F. 2d 992 (C.C.A. 2d, 1939) (alleged reason for discharge given at hearing was the tardiness of the employee, but this excuse not given to employee upon discharge); *Matter of Caroline Mills, Inc.*, 71 N.L.R.B. No. 54 (1946).



that he had in fact discriminated.<sup>63</sup> While it may be said that the use of this kind of evidence in effect shifts the burden to the employer to justify his actions, it would seem that if it could be shown that the complainant had satisfied the employer's objective requirements, it would be reasonable to require the employer to show that his actions were not in fact based on an outlawed standard.<sup>64</sup>

In the employment field, as in the previously discussed forms of discrimination, the use of the "quota system" has appeared. While there can be no doubt that a quota system, based on an outlawed standard, is equally as discriminatory as complete exclusion, it is often impossible, in the absence of direct evidence, to distinguish a shrewdly operated quota system from the results of a chance distribution. Thus the passage of anti-discrimination laws may result in the more widespread use of quota systems as a device for concealing the use of an outlawed standard. But while it may be impossible to demonstrate that an employer is operating under a quota system, the evil effects of such a system can be partially alleviated if the fact that Negroes, Jews, or any minority group have been or are being employed is not considered in itself conclusive evidence that a particular complainant, whose qualifications have been demonstrated, has not been discriminated against.

### III. BURDEN AND PRECISION OF PROOF

The paradox of the enactment of anti-discrimination statutes leading to the use of discriminatory quota systems is an illustration of the very real danger that effective enforcement of anti-discrimination measures may be defeated at the evidentiary stage. It is because of this danger that in enforcing such measures primary reliance must be placed on voluntary compliance. However, the dangers also may to some extent be alleviated by the requirements set up for the burden and precision of proof of discrimination. For while precision and certainty in proof of discrimination may be impossible for the complainant, proof that an action was in fact not based on an outlawed standard does not in many cases present such difficulty to the accused. This is true because the reasons for a person's actions lie primarily within his own knowledge. If there has been no discrimination, the defendant can show that there were good reasons for his actions.<sup>65</sup> On the other hand, the dangers of unjustifiably limiting free choice

<sup>63</sup> In addition, there is the fact that no reason was given to the applicant for refusal to hire him.

<sup>64</sup> See *Bailey v. Washington Theatre Co.*, 112 Ind. App. 336, 41 N.E. 2d 819, 821 (1942). In considering whether refusal to admit a Negro into a theater was in violation of the state civil rights statute, the theater owner gave as his reason for refusal, "I just don't like you, and just don't want you in my theater." Although dictum, because the owner in court admitted that he refused admission because of race, the court's comment on his alleged reason is pertinent: "It is apparent that in all cases where a colored person is denied the right and privileges guaranteed him . . . a defendant could deny that exclusion was because of race or color, and could place the reason therefor as dislike. When such a defense is asserted, and no basis for dislike is shown, this court, upon appeal, is not bound by the seeming conflict."

<sup>65</sup> See *NLRB v. Remington Rand, Inc.*, 94 F. 2d 862 (C.C.A. 2d, 1938).

must also be kept in mind. The doctrine of the *prima facie* case affords an effective compromise between the difficulties of precise proof of discrimination and the unjustified limitations on free choice which too lax requirements of proof would create. While the burden of introducing evidence and of persuasion would originally rest with the party bringing the charge, if the complainant could show that the use of an outlawed standard provided a reasonable explanation for the defendant's present and past actions, then it could be said that the complainant had met the burden unless the defendant could show that his actions and the results complained of were brought about for reasons other than the use of the outlawed standard.

It is a different question, however, to determine what elements should be present before a *prima facie* case is recognized. Several factors must be considered: the nature of the charge, the type of action brought, and the remedy sought. For example, the Supreme Court's willingness to recognize a *prima facie* case in the discriminatory jury-selection cases<sup>66</sup> can be explained in part, at least, by the fact that the remedy sought is an impeachment of a verdict and not a criminal punishment or direct or indirect financial recovery. Thus, an erroneous finding of discrimination, which in fact did not exist, would result merely in placing an extra burden on the state judicial machinery.<sup>67</sup> Likewise, in the case where a general injunction is sought, less certainty in the proof would be necessary than where affirmative action is the remedy desired. In the case of discrimination against a group, the showing of the general equality of the group to other groups plus the showing of unequal treatment accorded to the group should be sufficient to raise a *prima facie* case,<sup>68</sup> while in the case of discrimination against an individual, the equality of the particular individual in question to other individuals differently treated should be demonstrated. Nevertheless, in the latter situation as well, it would seem that if a job applicant could show, for example, that he possessed the objective qualifications for the job in question, the burden could reasonably be placed on the employer to

<sup>66</sup> Cases cited note 39 *supra*.

<sup>67</sup> Moreover, since the question of discrimination in jury selection has most often arisen in criminal cases, the policy of assuring the accused a fair hearing would seem to outweigh any considerations of efficient jural mechanics. See *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939): "Yet when a claim is properly asserted . . . that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests." See Berger, *The Supreme Court and Group Discrimination since 1937*, 49 Col. L. Rev. 201 (1949).

<sup>68</sup> In the cases of group discrimination against Negro teachers some courts have indicated a tendency to recognize a *prima facie* case when the unequal payment of Negro teachers is shown. See *Davis v. Cook*, 80 F. Supp. 443, 451 (Ga., 1948). Accounting for statistical errors, "... there is still left so wide a gap between comparative salaries of white and Negro teachers that it cannot be attributed to other causes than discrimination because of color or race." But other courts have required more than the showing of a statistical discrepancy between wages received by white and Negroes. *Reynolds v. Board of Public Instruction*, 148 F. 2d 754 (C.C.A. 5th, 1945), cert. den. 326 U.S. 746 (1945); *Turner v. Keefe*, 50 F. Supp. 647 (Fla., 1943).

justify his actions as not being discriminatory. Finally, it would seem reasonable to require a greater precision and certainty of proof when an action is brought against a private person than when brought against the state.

The conflict between free choice and equality which is created by the enactment and the enforcement of anti-discrimination measures will exist as long as racial, religious, and other forms of group prejudices endure in our society. While the fact that discrimination is not susceptible of certain proof may heighten this conflict, a judicious establishment of the requirements of proof and a skillful manipulation of the burdens created by these requirements may serve to prevent the engulfing of either ideal by the other.

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### DETERMINATION OF JUST COMPENSATION IN A CONTROLLED MARKET

When private property is taken for public use, the usual measure of "just compensation"<sup>1</sup> is "market value."<sup>2</sup> The justice of this measure in a free market appears manifest: "These market values, being the result of competitive purchase by persons free to utilize purchasing power as they please, may be accepted as measuring roughly the relative importance (for the community) of physical units of different things."<sup>3</sup>

However, when the government requisitions commodities in wartime, the adequacy of the normal rule is challenged by three different market situations.

First, the wartime market reflects "unusual" economic circumstances involving "abnormal" conditions of supply and demand, and it may be argued that these abnormalities should be recognized in a court's finding of just compensation. In *C. G. Blake Co. v. United States*,<sup>4</sup> a case arising out of World War I, the government maintained that "on account of abnormal conditions, resulting from the war . . . there was no true or fair market, and no such thing as fair market value. . . ."<sup>5</sup> The court held, however, that "fair market value" does not necessarily mean value in "a market in which the supply about equals the demand, and in which conditions might be termed fairly normal. . . ."<sup>6</sup> Such wartime economic abnormalities provide no greater reason to suspend the market value rule than comparable abnormalities in peacetime:

" . . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 5.

<sup>2</sup> The phrases "market value" and "just compensation" have been used interchangeably to such a degree that Nichols declares, "Market value, and market value alone, is the universal test." 1 Nichols, *Eminent Domain* 663 (2d ed. 1917); see 2 Lewis, *Eminent Domain* § 706 (3d ed. 1909). The current view is that "market value is simple the ordinary test, to be rejected in those exceptional cases where it would not constitute 'just compensation.'" Orgel, *Valuation Under Eminent Domain* 60 (1936).

<sup>3</sup> Simons, *Economic Policy for a Free Society* 46 (1948).

<sup>4</sup> 275 Fed. 861 (D. C. Ohio, 1921).

<sup>5</sup> *Ibid.*, at 862.

<sup>6</sup> *Ibid.*, at 866.